HOUSING AND DEVELOPMENT BOARD v. LEE SEM YOONG SDN. BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Hashim Yeop A. Sani & Syed Agil Barakbah S.C. JJ.) August 1 & 14, 1986 & January 24, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 115 of 1986]

Contract – Assignment – Novation – Damages – Contracts Act, 1950, s. 63.

In this case the respondents had entered into a written agreement with the receiver and manager of a company in Singapore then in liquidation for the supply of Lesey clay. Subsequently, the appellants informed the respondents that they had taken over the operation of the company and requested the respondents to continue the supply of Lesey clay to the appellants. The respondents continued to do so for some time, until they received a letter from the appellants asking them to suspend all supplies. The respondents complied and waited for a request from the appellants to resume delivery. However no such request came. The respondents had to store the clay at their godown. The respondents brought an action for breach of contract and obtained judgment for the sum of $90,838.35 as damages and the sum of $27,480.00 as storage charges. The appellants appealed.

Held, dismissing the appeal: (1) in this case there was an assignment of the agreement by the receivers to the appellants who thereupon committed breach of trust by failing to take deliveries of more than 3,000 tons of clay as agreed;

(2) the award of damages for breach of contract was fair and reasonable and the respondent was also entitled to obtain the storage fees.

Cases referred to:

(1) *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.* [1902] 2 K.B. 660, 668, C.A.
(2) *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.* [1903] A.C. 414 H.L.
(3) *Khardah Co. Ltd.* v. *Raymon & Co. (India) Pte. Ltd.* A.I.R. 1962 S.C. 1810, 1817.
(4) *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B 206, 207.
(5) *Tito* v. *Waddell (No. 2)* [1977] 1 Ch. 106, 290.
(5a) *Scarf* v. *Jardine* (1882) 7 App. Cas. 345, 351; [1881-5] All E.R. Rep. 651.
(6) *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch. 52, 84, 86.
(7) *Roper* v. *Johnson* (1872-73) L.R. 8 C.P. 167.

SUPREME COURT.

Wong Chong Wah (*Wong Chee Lim* with him) for the appellants.

Robert Lazar for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): On March 11, 1986, in the High Court, Kuala Lumpur, the respondents/plaintiffs succeeded in their claim against the appellants /second defendants for breach of contract and obtained judgment for the sum of $90,838.85 as damages, and the sum of $27,480.00 as storage charges together with interest thereon at 8% per annum from the date of judgment to the date of realisation. Their claim against the first defendant was dismissed. The appellants were ordered to pay the taxed costs to the respondents and the first defendant.

The appellants being dissatisfied with the decision of the High Court filed notice of appeal on April 7, 1986. The appeal came before us for argument.

Before dealing with the relevant grounds of appeal, we would like to touch on the relevant facts.

On October 31, 1977, the respondents, a limited company carrying on business *inter alia* as suppliers of Lesey clay and having its registered office in Kuala Lumpur entered into a written agreement with the first defendant, one Peter Chi Man Kwong, an accountant carrying on business in Singapore who acted in the capacity of receiver and manager of the property and assets of the Singapore Ceramics Limited which was then in liquidation (the company).

The agreement states :

"It is hereby agreed between the Receivers and Managers, Singapore Ceramics Ltd. on one part and Mr. Lee Sem Yoong trading as Lee Sem Yoong Sdn. Bhd. of the other part as follows :

In consideration of the Receivers and Managers advancing M$30,000 to Lee Sem Yoong Sdn. Bhd., Lee Sem Yoong undertakes to supply a minimum of 9,000 tons of Lesey Clay at M$28.00 per metric ton ex works to the Receivers and Managers. The Lesey Clay supplied should be of consistent quality, within limits. The M$30,000 payable to Lee Sem Yoon Sdn. Bhd. shall be secured by a Banker's Guarantee to be issued by Southern Bank Bhd., a bank incorporated in Malaysia under the laws of Malaysia. Repayment of the loan shall be by way of a deduction of M$10.00 per m/ton and Lee Sem Yoon Sdn. Bhd. shall supply a minimum of 200 m/ton per month, failing which the Receivers and Managers will notwithstanding deduct M$2,000 per month. The Receivers and Managers undertakes to purchase a minimum of 200 m/ton per month, subject to:

1) quality being consistent within limits.

2) unforeseen circumstances beyond the control of the Receivers and Managers.

The LESEY CLAY shall be supplied 2½ months after the signing of the Agreement and such clay supplied shall not exceed 25% moisture content. Any excess shall be deducted proportionately.

This Agreement is assignable in the event of a sale of the factory and undertaking by the Receivers and Managers.

for and on behalf of LEE SEM YOONG SDN. BHD.	for and on behalf of SINGAPORE CERAMICS LTD.
Sgd. LEE SEM YOONG	Sgd. PETER CHI Receiver and Manager
Sgd. (Illegible) WITNESS	Sgd. (Illegible) WITNESS."

It was accepted by the learned Judge from the evidence that the respondents started supplying clay ex works in January 1978 which was well within the two and a half month period as stipulated in the agreement and continued to do so until April 17, 1978, when the first defendant informed them by letter that the appellants had taken over the operation of the company and requested the respondents to continue the supply of Lesey clay to the appellants.

The letter reads:

"M/s Lee Sem Yoong Sdn. Bhd.,
84 Jalan Kilang,
Kuala Lumpur.

Dear Sirs,

This is to inform you that the Housing & Development Board has formally taken over the operation of the tile factory on 1st April 1978. I shall be pleased if you will deliver the clay as usual to the factory at 134 Hillview Avenue, Singapore 23. However, please indicate the name, Housing & Development Board Tileworks on all your delivery notes and invoices instead of Singapore Ceramics Ltd.

As agreed, the Board will commence to deduct $10 per ton for each ton of clay delivered after 1st April 1978. In the meantime, kindly expedite with the delivery of not less than 3,000 tons by October 1978.

Yours faithfully,
For and on behalf of
SINGAPORE CERAMICS LIMITED
Sgd.
Peter Chi
Receiver & Manager

c.c. Mr. Jack See Tian Min,
Housing & Development Tileworks,
134 Hillview Avenue
Singapore 23."

Earlier on February 16, 1978, the first defendant and another in their capacity as the receivers and managers of the property and assets of the company executed an agreement with the Development Bank of Singapore and the appellants in which they agreed to sell the property and assets of the company to the appellants as the purchasers. The Bank was a party to the agreement because it held three mortgages of land and building belonging to the company and of which the receivers and managers were the mortgagers. The said property is mentioned in the first schedule to the agreement.

As a result of the first defendant's letter, the respondents supplied clay to the appellants for about thirteen months as noted by the learned Judge, *i.e.* from May 1978 until May 1979 and the appellants made the necessary payments. On May 7, 1979, the appellants wrote to the respondents requesting them to suspend all supplies. The letter states:

"M/s Lee Sem Yoong Sdn Bhd
P O Box 1, Rawang
Selangor
West Malaysia

Attention : Mr. Lee

Dear Sir

LESEY CLAY

1. We write to inform that all storage bays are now fully occupied with clay, and therefore request you to suspend all deliveries with immediate effect.

2. At the same, we regret to advise you that the quality of clay which was supplied recently has not been satisfactory.

3. According to our laboratory reports, the recent clay supplied lacks plasticity and has poor fired strength. Certain loads were also contaminated with ironoxide containing clay.

4. We trust that you personally look into this and rectify the problem.

5. We shall advise you in writing to resume delivery as soon as space are available.

Yours faithfully,

Sgd.
THO TUCK FOO
PLANT SUPERINTENDENT."

The respondents complied and waited for the request from the appellants to resume delivery as indicated at paragraph 5 of their letter. No such request came. The respondents wrote several letters of enquiry to the first defendant and the

appellants, but received no reply (see pages 234 to 243, Volume 2 of Appeal Record). Because of the appellants' failure to take further delivery, the respondents had to store at their godown 3,310.7625 tons of clay being the balance of the agreed minimum of 9,000 tons, still uncollected and had thereby incurred storage charges at the rate of 10 cents per ton per diem. Subsequently in March 1980, part of the remaining stock stated above was disposed of by the respondents at a low price of $1,862.50. After sending notices of demand and of their intention to take legal action, the respondents filed a writ on July 21, 1980, against both the first defendant and the appellants.

There are seven grounds of appeal, the main grounds dealing with the question of contractual relationship between the parties and the rest, with the questions of damages, storage charges and costs. In relation to the first three grounds, it was submitted that the trial Judge was wrong in holding that the respondents could sue the appellants on the October 1977 contract in which the appellants were not a party, on the principle that a contract cannot impose a burden on anyone who is not a party to it. It was also submitted that the learned Judge erred in law and in fact in holding that the said agreement was assigned to the appellants who were bound by the terms of the agreement. The ground put forward in support of this contention was that the October 1977 agreement consisted only of obligations which under the law could not be assigned but must be transferred by way of novation. The main issue therefore is whether there was an assignment of the October 1977 agreement by the first defendant to the appellants.

The general rule is that a contract cannot confer rights or impose obligations on persons who are not parties to the contract. It is also an accepted principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party. "Neither in law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot release himself of his liability to a creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all the three, and involves the release of the original debtor." (*Per* Sir Collins M.R. in *Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.*[1]).

On the other hand, it is well settled that the rights or benefits under a contract may in general be assignable in equity according to the normal rules governing the assignment of a chose in action and may be enforced by the assignee. The assignor ought in ordinary circumstances be made a party. (*Tolhurst* v. *Associated Portland Cement Manufacturers Ltd.*[2]). But where the right of a party is conditional upon the performance by him of his own obligations, the right cannot be assigned in any way which discharges him from his own duty of performance except with the consent of the other party (see *Benjamin's* Sale of Goods, 2nd Edition, page 128, para 242).

The Supreme Court of India in *Khardah Co. Ltd.* v. *Raymon & Co. (India) Pte. Ltd.*[3], also held that as a rule obligations under a contract cannot be assigned except with the consent of the promisee and it becomes a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in nature or the rights are incapable of assignment.

Let us examine the October 1977 agreement. It is clear that the first defendant by advancing the loan of M$30,000/- which was consideration for the contract, has the benefits under the said agreement, *viz.* the benefit of the supply of a minimum of 9,000 tons of Lesey clay by the respondents at the cost of M$28.00 per metric ton, the minimum supply per month being 200 metric tons, the right to deduct the sum of M$10.00 per ton from the monthly supply by way of repayment of the loan, the right to refuse acceptance of the supply of clay which falls short of 200 metric tons and for failure of supply to deduct M$2,000.00 per month as payment towards the loan. The only obligation on their part was the undertaking to purchase the minimum of 200 metric tons per month up to the minimum of 9,000 metric tons but that was subject to their right of refusal if the quality of clay was unsatisfactory and unforeseen circumstances beyond their control prevented them from taking the supply of clay. It was submitted that the first defendant was not obliged to purchase 9,000 metric tons of clay.

We are of the opinion that the first defendant was obliged to purchase a minimum of 9,000 metric tons of Lesey clay because that is clearly implied from the contract based on the principle that he who takes the benefit must also bear the burden. The $30,000.00 loan would be covered by the supply of 3,000 metric tons of clay and even if that amount had been supplied and the loan was

fully paid up, the respondents would still be bound to supply the balance of 6,000 tons based upon their undertaking to do so in the agreement. Any failure to supply the balance would result in a breach of contract. A similar situation would apply to the first defendant. The obligation on the part of the first defendant was so obvious that it would go without saying and there was no necessity for any express provision in the agreement. (*Shirlaw* v. *Southern Foundries (1926) Limited*[4]).

Turning to the February 1978 agreement, it is primarily an agreement of sale and transfer of all the assets of the Company to the appellants and not a transfer of liability except as provided in clauses 3 and 8 thereof. The assets of the Company are divided into six different heads and are contained in clause I of the agreement. Clause 3 says:

"The Purchasers shall not (except as provided in Clause 8 hereof) be in any manner liable for the debts and liabilities of the Company or of the Receivers and the Receivers shall indemnify the Purchasers against all actions proceedings claims and demands from third parties in respect of the ownership of the Assets."

Clause 8 provides:

"(a) In consideration for the sale to the Purchasers of the benefits of the said subsisting contracts referred to in head Fifthly of Clause 1 hereof, the Purchasers undertake to satisfy and discharge all the pending liabilities of the Receivers thereunder upon the arrival of the goods in Singapore and thereafter to take such action as may be necessary to ensure the delivery of possession of the goods to them.

(b) The Receivers undertake to use their best endeavour to ensure the delivery of such goods in accordance with the terms of the contracts entered into between the Receivers and the suppliers.

(c) (i) Upon completion the Purchasers shall pay the Receivers the sum of Singapore Dollars Thirty Thousand S$30,000.00) being reimbursement of the payment made by the Receivers to Lee Sem Yoong pursuant to an Agreement dated 31st October, 1977 entered into between them, on the basis of the undertaking hereby given by the Receivers to the Purchasers to refund any undeducted balance of the said sum of S$30,000.00 paid to Lee Sem Yoong if the said Lee Sem Yoong shall fail to supply a minimum of 3,000 metric tons of Lesey Clay.

(ii) In the event that the Receivers are able to secure the execution by Lee Sem Yoong Sdn. Bhd. of an agreement with the Purchasers being made a party thereto and the issuance of a Bank guarantee in favour of the Purchasers whether before or after completion, the Receivers shall be released and discharged absolutely from the undertaking given in Clause 8(c)(i) hereof."

We have purposely put up these clauses *in extenso* in order to show the transfer of the benefits and the burden derived from the October 1977 agreement to the appellants according to the terms and conditions as provided in clause 8. The receivers however are not released and discharged from their undertaking in clause 8(c)(i) until they have secured the execution of a fresh agreement between the respondents and the appellants as parties thereto and the issuance of a bank guarantee by the respondents in favour of the appellants as in clause 8(c)(ii). It should be noted that the February 1978 agreement was entered between the receivers of the company in the person of the first defendant and another acting as receivers and managers thereof, and the appellants. The respondents were not a party.

It was submitted that consent of the respondents had not been obtained in the assignment of the October 1977 agreement by the receivers to the appellants. With respect, we do not agree. We are satisfied that such consent can safely be implied from the respondent's conduct on receipt of three letters including the one stated earlier dated April 17, 1978 (see pages 212, 213 and 214 of Appeal Record, Volume 2). These letters, in our view, amount to sufficient notice to the respondents that the contract had been assigned to the appellants. Moreover, the last clause of the October 1977 agreement states that the agreement is assignable. As stated earlier, the respondents thereafter supplied clay to the appellants for about thirteen months and accepted payments thereof from the appellants. It was submitted that the first defendant still gave instructions to the respondents in spite of the transfer as though the October 1977 agreement was still in existence and in the circumstances there could not be any assignment. The learned Judge correctly dealt with this point and rightly concluded that under clause 8(b) of the February 1978 agreement, the receivers undertook to use their best endeavours to ensure the delivery of the goods according to the terms of the contract. We agree with respect with the trial Judge that "this attitude cannot change the position that the assignment had occurred."

We are of the view that the assignment in this case falls under the classification of conditional benefits as expounded by Megarry V.C. in *Tito* v. *Waddell (No. 2)*[5], *viz.* where the benefit and the burden in an instrument has been annexed to each other *ab initio* such that the conditions or restrictions became an intrinsic part of the right, it is not only the original grantee who is bound by the burden but his successors in title must take the right as well as assuming the burden.

In his judgment, the trial Judge went further and held that there was novation. He said:

"However, even though it can be said that the Company's liability had been assigned, it is clear from the 2nd Defendant's conduct that the Plaintiff had authorized the 2nd Defendant to novate the 1st Defendant's liability. This conduct from a legal point of view is valid. (*Cheshire & Fifoot's* Note 10 pg 472).

It is clear from the conduct of the Plaintiff the delivery of the goods to the 2nd Defendant, and the Plantiff received payment for goods that the novation was valid, and did occur. I confirm, therefore, that the judgment here is made against the 2nd Defendant with costs."

He did not give any reasons for his conclusion apart from what is stated above.

Was there a novation? Section 63 of the Contracts Act, 1950 (Act 136) expressly provides that parties can novate their contract. It says:

"If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

Illustration (a) states:

"A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted."

There is a distinction between novation and assignment. Novation has been defined in the House of Lords[5a]: "That, there being a contract in existence, some other contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract . . . . . ". There is an annulment or discharge of one debt and the creation of a substituted debt in its place; in order to be effective, the debtor must be a party. Whether or not there is novation of a contract is a question of fact in each case, and the intention to do is a fact which must clearly be proved (*Pollock & Mulla:* The Indian Contract & Specific Reliefs Act, 9th Edition). Novation is a transaction by which a new contract is substituted for one that has already been made. Unlike assignment, novation does not involve the transfer of any property at all. It comprises (a) an annulment of one debt and (b) the creation of a substituted debt in its place. (*Re United Railways of the Havana and Regla Warehouses Ltd.*[6]).

We do not think that the learned Judge was right in concluding that there was novation. There might be intention to do so as envisaged at clause 8(c)(ii) of the February 1978 agreement, but that would be subject to the conditions stated therein. In the absence of evidence in support thereof, the matter becomes purely academic. Although there was no novation, the fact still remained that there was assignment of the October 1977 agreement by the receivers to the appellants who thereafter committed a breach of contract by failing to take deliveries of more than 3,000 tons of clay according to the facts and circumstances of the case as described earlier. For the reasons stated above, we agree with the learned Judge that the respondents were entitled to damages from the appellants due to the latter's breach.

The next ground relates to the award of damages for breach amounting to $90,838.50 which it was submitted was excessive and unreasonable and that the learned Judge did not consider that the respondents had failed to mitigate their loss.

The respondents in the Court below had proved their claim for damages. There was a balance of more than 3,000 tons of clay stored in their godown which the appellants had failed to take delivery and had been lying there for some time. There was evidence to show that the respondents had approached a number of companies to dispose off the clay at a higher price but was not successful. That was corroborated by the former manager of Rawang Industrial and Property Sdn. Berhad (PW3) who bought 1,800 tons of clay. He stated that his company could not pay a high price although the quality of clay was good because they were making use of the clay for making ordinary tiles. The selling price of tiles at that time was cheap. The 1,800 tons of clay were then disposed off for $1,862.50. The respondents having shown their futile attempts to mitigate the loss and having made out a case for damages, actual or prospective, to the amount stated, it becomes the duty of the appellants to show by way of rebuttal how and to what extent that claim ought to be mitigated. No such evidence was adduced (see *Roper* v. *Johnson*[7]). We are satisfied that the award of damages for the breach is fair and reasonable and confirm the same.

The next ground refers to the award of $27,480.00 as storage charges which the appellants submitted was unrealistic and unjustifiable. We do not think so. It must be remembered that the appellants merely requested the respondents to suspend deliveries until further notice to resume

the same "as soon as space are *(sic)* available." It was not surprising that in the circumstances the respondents were bound to store the clay which were then ready for delivery in their godown and charged 10 cents per ton per day as storage fee since they had to pay rental for their use of the godown. We cannot see any reasonable ground for depriving the respondents from obtaining the storage fees as proven and accepted by the learned Judge. We confirm this Order accordingly.

The last ground relates to costs. The respondents'/plaintiffs' claim against the first defendant was dismissed by the trial Judge who ordered the appellants (second defendant in the Court below) to pay the costs. In our view, the costs in relation to the first defendant should be paid by the respondents/plaintiffs since they were unsuccessful in their claim against the first defendant. We order accordingly.

We dismiss the appeal with costs to be paid by the appellants to the respondents.

Deposit to respondents on account of taxed costs.

Appeal dismissed

Solicitors: *Skrine & Co.; Shearn Delamore & Co.*

TEOH KIM SENG v. HASSAN BIN MOHAMED & ANOR.

[S.C. (Abdul Hamid C.J. (Malaya), Lee Hun Hoe C.J. (Borneo) & Hashim Yeop A. Sani S.C.J.) December 10, 1986 & January 27, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 323 of 1986]

Tort – Negligence – Deceased killed in running down case – Deceased 12 years old at time of accident – Damages for loss of expectation of life – Damages for lost years – Civil Law Act, 1956, s. 8(2)(c).

Damages – Fatal accident – 12 years old child – Loss of expectation of life.

In this case the deceased who was killed in a running down case was 12 years old at the time of the accident. The learned trial judge made the following award of damages –

Special damages as agreed	$1,500.00
Damages for loss of expectation of life	$4,000.00
Damages for loss of earning in the lost years under s.8(2)(c)	$14,954.65

The evidence showed that the deceased used occasionally to assist his father selling fish at an unlicensed stall in the market and was given $32.00 a month, which the father admitted was for pocket expenses. The appellant appealed.

Held: (1) the award for loss of expectation of life should be increased to $6,000.00 which would be a more reasonable figure;

(2) in this case there was in fact no material on which a proper assessment could be made for earnings during the lost years and therefore the appeal against the item of damages for such loss of earnings should be allowed.

Cases referred to:

(1) *Lee Sai Cheong* v. *Wan Lim Cheong* [1962] M.L.J. 259.
(2) *Benham* v. *Gambling* [1941] A.C. 157.
(3) *Gammell* v. *Wilson; Furness* v. *B.S. Massey Ltd.* [1981] 1 All E.R. 578.
(4) *Abdul Malek bin Hassan* v. *Mohamed Hihwan bin Mastuki & Anor.* [1987] 1 M.L.J.
(5) *Pickett* v. *British Railway Engineering* [1979] 1 All E.R. 774.

SUPREME COURT.

Manjit Singh for the appellant.
Brijnandan Singh Bhar for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): This is a running down case. The deceased was 12 years at the time of accident. The learned judge made the following award of damages:

"Special damages as agreed	$1,500.00
Damages for loss of expectation of life	4,000.00
Damages for loss of earning in the lost years under section 8(2)(c)	14,954.65"

The Civil Law Act was amended in 1984 and the amendment to section 8 of the Act excluded from the application of that section damages for bereavement under the dependency claim, damages for loss of expectation of life and damages for loss of earnings in respect of any period after the person's death. Since the deceased died in 1981 the amendment does not apply to this case.

In the instant case evidence disclosed that the deceased used to assist the father selling fish at an unlicensed stall outside the central market in Alor Setar during school holidays and during weekends. The father said that he paid the deceased $32/– per month. But the learned judge also accepted the